

A Overseas Assurance Corp (M) Bhd v MSIG Insurance (M) Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02-(NCC)-120 OF 2011

B ZAINUN ALI, RAMLY ALI AND BALIA YUSOF JJCA
16 MAY 2011

C *Civil Procedure — Appeal — Interference by appellate court — Whether serious misdirection by trial judge — Whether insufficient judicial appreciation of evidence by trial judge*

D *Insurance — Contribution — Right to recover contribution — Insured covered under two policies — Respondent sought to recover contribution from appellant after it indemnified insured in full — Whether each insurer liable for 50% of claim by insured — Whether rateable proportion clause excluded right of contribution — Whether respondent had legal obligation to pay additional 50% of insured's claim — Whether cause of insured's loss excluded from coverage under respondent's fire policy — Whether respondent acted as volunteer in respect of indemnity paid out to insured*

F Both the appellant and the respondent had insured Perdana Parkcity Sdn Bhd ('the insured'), a housing developer, under different policies. The appellant had issued a contractor's all risk policy ('CAR policy') and the respondent a fire policy. When cracks were discovered in the houses constructed by the insured, it made a claim against the appellant and the respondent. The respondent's loss adjuster recommended a settlement of the insured's claim, and so the respondent indemnified the insured in full for its total loss and then sought to recover a contribution from the appellant. The appellant refused to contribute whereupon the respondent filed a claim against the appellant to recover half of the payment made to the insured. It was the respondent's case that where there were two insurance policies covering the same insured and the same subject matter, each insurer should be liable for 50% of the total amount claimed by the insured. As such, the respondent contended that it was entitled under the doctrine of contribution in insurance to recover the amount of RM522,838.31 or one half of the total loss of RM1,011,838.31, which it had already paid to the insured. The appellant denied liability. The trial judge found that the respondent had successfully established all the six conditions that entitled it to succeed in this claim and thus allowed the respondent's claim with costs. This was the appellant's appeal against that decision. The appellant argued, inter alia, that both insurance policies contained a rateable proportion clause, which limited their respective liabilities, and that such a clause excluded the right of contribution. As such, the appellant contended that the respondent had acted

as a volunteer in respect of half of the indemnity it paid out to the insured and could not look for contribution from the appellant to cover that part of the indemnity.

Held, allowing the appeal with costs:

- (1) In the present case, both the respondent's fire policy and the appellant's CAR policy contained a rateable proportion clause. There were ample authorities to support the proposition that where a policy contained a rateable proportion clause, the insurer was not entitled to contribution from the other insurers, if it paid out more than the proportion it was liable to pay under its policy, since contribution arose out of a legal obligation to pay. As the respondent had no legal obligation to pay the additional 50% of the insured's claim, it followed that it had acted as a volunteer or had paid on an ex gratia basis on the extra 50%. As such, the respondent's claim for contribution in the present case must fail as it had volunteered to pay the insured in full, even though there was no legal liability for it to do so, by virtue of the rateable proportion clause in its fire policy. It was thus found that on this ground alone the appeal should be allowed with costs (see paras 21–28, 53).
- (2) The cause of the insured's loss in the present case was 'design related' and under the respondent's fire policy, loss or damage that occurred as a consequence of defective design or inadequate construction of foundation was excluded from coverage and thus not payable. Since the cause of the loss was 'design related', exclusion (c) of the 'subsidence and landslip' extension to the respondent's fire policy would apply to exclude the insured's claim. As such, the whole payment made by the respondent to the insured was made voluntarily ie when the respondent was not legally liable under the fire policy to make such payment. The voluntary payment would not trigger the application of contribution from the appellant, as equity would not assist a volunteer. This was another ground for allowing the appeal (see paras 30, 36–48, 54).
- (3) There was a serious misdirection by the trial judge in failing to consider the rateable proportion clause despite the appellant's submissions highlighting the existence of the same in the respondent's fire insurance policy. There was also insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him and the principles that should govern such a case. The trial judge had erred in allowing the respondent's claim with costs (see paras 52 & 55).

[Bahasa Malaysia summary]

Kedua-dua perayu dan responden telah menginsuranskan Perdana Parkcity Sdn Bhd ('pengambil insurans'), pemaju perumahan, di bawah polisi-polisi berbeza. Perayu telah mengeluarkan polisi semua risiko kontraktor ('polisi

- A CAR') dan responden polisi kebakaran. Apabila keretakan didapati di rumah-rumah yang dibina oleh pengambil insurans, ia membuat tuntutan daripada perayu dan responden. Pelaras kerugian responden mencadangkan penyelesaian terhadap tuntutan pengambil insurans, dan responden membayar penuh ganti rugi kepada pengambil insurans untuk kerugian
- B sepenuh dan kemudiannya memohon untuk mendapatkan semula sumbangan daripada perayu. Perayu menolak daripada menyumbang dengan itu responden memfailkan tuntutan terhadap perayu untuk mendapatkan semula sebahagian bayaran yang dibuat kepada pengambil insurans. Ia adalah kes responden bahawa di mana terdapat dua polisi insurans yang melindungi
- C pengambil insurans yang sama dan perkara yang sama, setiap penginsurans patut bertanggungjawab untuk 50% daripada jumlah penuh yang dituntut oleh pengambil insurans. Oleh itu, responden berhujah bahawa ia berhak di bawah doktrin sumbangan dalam insurans untuk mendapatkan semula jumlah
- D RM522,838.31 atau sebahagian kerugian penuh sebanyak RM1,011,838.31, yang mana ia telah bayar kepada pengambil insurans. Perayu menafikan liabiliti. Hakim bicara mendapati bahawa responden telah berjaya membuktikan kesemua enam-enam syarat yang memberikan ia hak untuk berjaya dalam tuntutan ini dan oleh itu membenarkan tuntutan responden dengan kos. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu
- E berhujah, antara lain, bahawa kedua-dua polisi insurans mengandungi klausa perkadaran kena bayar, yang menghadkan liabiliti mereka masing-masing, dan bahawa klausa sedemikian mengecualikan hak penyumbangan. Oleh itu, perayu berhujah bahawa responden telah bertindak sebagai sukarelawan berkaitan sebahagian indemniti yang dibayarnya kepada pengambil insurans
- F dan tidak boleh mendapatkan sumbangan daripada perayu untuk melitupi bahagian indemniti tersebut.

Diputuskan, membenarkan rayuan dengan kos:

- G (1) Dalam kes ini, kedua-dua polisi kebakaran responden dan polisi CAR perayu mengandungi klausa perkadaran kena bayar. Terdapat autoriti-autoriti yang banyak untuk menyokong cadangan tersebut bahawa di mana polisi mengandungi klausa perkadaran kena bayar, penginsurans tidak berhak kepada sumbangan yang berbangkit daripada
- H penginsurans yang lain, jika ia membayar lebih daripada bahagian yang ia bertanggungjawab untuk membayar di bawah polisinya, memandangkan sumbangan berbangkit daripada tanggungjawab undang-undang untuk membayar. Memandangkan responden tidak mempunyai tanggungjawab di sisi undang-undang untuk membayar
- I 50% tambahan terhadap tuntutan pengambil insurans, oleh itu ia telah bertindak sebagai sukarelawan atau telah membayar atas asas ex gratia atas tambahan 50% tersebut. Oleh itu tuntutan responden untuk sumbangan dalam kes ini mesti gagal kerana ia telah secara sukarela membayar pengambil insurans sepenuhnya, walaupun tidak terdapat

tanggungjawab undang-undang untuk ia berbuat demikian, berikutan klausa perkadaran kena bayar dalam polisi kebakarannya. Oleh itu didapati bahawa atas alasan ini sahaja rayuan patut dibenarkan dengan kos (lihat perenggan 21–28, 53).

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- (2) Kausa kerugian pengambil insurans dalam kes ini adalah ‘design related’ dan di bawah polisi kebakaran responden, kerugian dan ganti rugi yang berlaku akibat reka bentuk cacat atau asas pembinaan yang tidak mencukupi dikecualikan daripada perlindungan dan oleh itu tidak dibayar. Memandangkan kausa kerugian adalah ‘design related’, pengecualian (c) ‘subsidence and landslip’ tambahan kepada polisi kebakaran responden akan terpakai untuk mengecualikan tuntutan pengambil insurans. Oleh itu, bayaran sepenuhnya yang dibuat oleh responden kepada pengambil insurans dibuat secara sukarela iaitu apabila responden tidak bertanggungjawab dari segi undang-undang di bawah polisi kebakaran untuk membuat bayaran sedemikian. Bayaran sukarela tersebut tidak akan mencetuskan permohonan sumbangan daripada perayu, kerana ekuiti tidak akan membantu sukarelewan. Ini adalah alasan lain untuk membenarkan rayuan (lihat perenggan 30, 36–48, 54).

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- (3) Terdapat salah arah yang serius oleh hakim bicara kerana gagal untuk mempertimbangkan klausa perkadaran kena bayar walaupun penghujahan-penghujahan perayu menekankan kewujudannya di dalam polisi insurans kebakaran responden. Juga terdapat penilaian kehakiman yang tidak mencukupi oleh hakim bicara terhadap keterangan keadaan yang dikemukakan di hadapan beliau dan prinsip-prinsip yang patut mengikat kes sedemikian. Hakim bicara tersilap dalam membenarkan tuntutan responden dengan kos (lihat perenggan 52 & 55).]

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Notes

For cases on insurance in general, see 8(1) *Mallal's Digest* (4th Ed 2011 Reissue) paras 1–433.

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For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 1158–1182.

Cases referred to

H

Bovis Construction Ltd v Commercial Union Assurance Co Plc [2001] 1 Lloyd's Rep 416 (refd)

Commercial Union Assurance Co Ltd v Hayden [1977] QB 804; [1977] 1 All ER 441, CA (refd)

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Gale v Motor Union Insurance Co Ltd [1928] 1 KB 359 (refd)

Goldstein v Salvation Army Assurance Society [1917] 2 KB 291 (refd)

Legal & General Assurance Society Ltd v Drake Insurance Co Ltd [1991] 2 Lloyd's Rep 36, CA (folld)

- A *North British and Mercantile Insurance Co v London, Liverpool & Globe Insurance Co* (1877) 5 Ch D 569 (refd)
Pentagon Construction [1969] Co Ltd v United States Fidelity & Guarantee Co [1978] 1 Lloyd's Rep 93 (refd)
Queensland Government Railways & Electric Power Transmission Pty Ltd v
- B *Manufacturers' Mutual Insurance Ltd* [1969] 1 Lloyd's Rep 214 (refd)
Scottish Amicable Heritable Securities Association v Northern Assurance Co (1883) 11 R 287 (refd)
Shatomah v Kader Maydin (1870) SLR Leic 275 (refd)
- C *Tunku Farik Tunku Ismail (Tan Sixin with him) (Azim, Tunku Farik & Wong) for the appellant.*
Kavitha N (P Ramesh Kumar with him) (Anad & Noraini) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

- D [1] The assured, Perdana Parkcity Sdn Bhd, was involved in the development of a residential township comprising of 165 units of two storey terrace houses known as Desa Parkcity, in Mukim Batu, Kuala Lumpur.
- E [2] The respondent and the appellant had issued their respective and separate insurance policies to the insured in relation to the said development project. The respondent had issued a fire policy and the appellant had issued a contractor's all risk policy ('CAR policy') to the same insured.
- F [3] After the completion of the construction of various units of buildings in the township, cracks appeared in the two storey terrace houses at Phase 1B known as Nadia Parkhomes (the said damage). The cracks were discovered on 11 January 2006.
- G [4] After having been notified of the said damage by the insured, the respondent proceeded to appoint a firm of loss adjuster to investigate and access the loss. The loss adjuster recommended settlement of the insured's claim. Accordingly the respondent proceeded to indemnify the insured for a
- H sum of RM1,011,838.31 for its total loss. The loss adjuster also recommended that the respondent to recover from the appellant by way of contribution.
- I [5] The appellant was first notified by this loss on 20 February 2006, however the respondent's solicitor sought such contribution through its letter dated 2 March 2009. The appellant having refused to contribute, the respondent proceeded to file the present claim to seek contribution from the appellant in respect of the amount of RM522,838.31.
- [6] On 10 December 2010, the learned High Court judge, after a full trial

held that the appellant was liable for a contribution and allowed the respondent's claim for the sum prayed and costs of RM35,000 in lieu of taxation. Hence the present appeal before this court.

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THE RESPONDENT'S CONTENTIONS

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[7] The respondent's contention is that since the loss suffered by the insured was a peril insured under two policies, the obligation to compensate the insured for the loss falls equally upon the two insurers ie the respondent and the appellant. The respondent further contended that upon the respondent indemnifying the insured for its total loss, the respondent is entitled under the doctrine of contribution in insurance law to recover half of the payment made to the insured, from the appellant.

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THE APPELLANT'S CONTENTIONS

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[8] The appellant on the other hand contended that the respondent's claim for contribution from the appellant is not payable for the following reasons:

- (a) the respondent's fire policy does not respond to the claim made by the insured, as the respondent's own geotechnical expert has identified the cause of the failure as 'defective/faulty design' and 'settlement' (as apposed to 'subsidence') which does not trigger liability under the fire policy;
- (b) there is no double insurance to give rise to the right of contribution against the appellant; and
- (c) in any event, as the respondent has volunteered to pay 100% of the insured's claim when there was no legal or contractual liability to do so by virtue of (a) above and also condition 19 of the respondent's fire policy (relating to rateable proportion). Equity will not help a volunteer.

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[9] The appellant also submitted that it is not liable to the respondent for contribution and has rightly and lawfully denied the respondent's claim; and the learned trial judge has therefore erred in allowing the respondent's claim with costs.

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FINDINGS OF THE HIGH COURT

[10] In allowing the respondent's claim with costs, the learned trial judge made the following findings:

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- (a) both the policies concerned comprise the same subject matter — being 165 units of Parkhomes; and so long as the item forming the subject matter of the claim is insured under two sets of insurance policies, then

- A the subject matter is deemed to be the same even if one of the two policies provides coverage for additional properties;
- (b) both the policies were affected by or on behalf of the same insured ie Perdana Parkcity Sdn Bhd. In both policies, Perdana Parkcity Sdn Bhd is insured as principal, and the fact that the insured is covered when performing the same or different jobs in respect of the subject matter in different capacities does not detract from the fact that, in respect of the claim, the insured is covered in the same capacity ie as principal;
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- C (c) both policies were in force at the time of loss. Since the respondent's policy was valid from 22 April 2005 to 21 April 2006 and the appellant's master policy was valid from 31 May 2002 to 30 May 2007, both the policies here in force at the time of the loss on 11 January 2006;
- D (d) both policies were legal contracts of insurance;
- (e) both the policies do not reveal any provisions excluding the right to contribution; and
- (f) both policies were affected against the same peril.

E [11] The learned judge concluded that the respondent had successfully established all the six conditions as explained by ER Hardy Ivamy in *The General Principles of Insurance Law* (6th Ed), Butterworths Publications at p 517, thereby entitling it to succeed in this claim.

F FINDINGS OF THIS COURT

G [12] In insurance on property or against liability, which are contracts of indemnity, the insured cannot, however many policies he may have effected, recover more than a full indemnity. When the insurers have discharged their liability, they are entitled, as between themselves and the other insurers, to call on the latter to bear their share of the loss and pay their proportion of the amount already paid under the first policy. This right is called the 'right of contribution', (see ER Hardy Ivamy in *The General Principles of Insurance Law*, (6th Ed), Butterworth Publications at p 517).

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I [13] According to *Halsbury's Laws of England* (4th Ed), Vol 25, 1994 at para 521, subject to any policy conditions to the contrary, the insured may effect as many policies as he pleases; but where the contract is one of indemnity, however numerous the policies may be, he cannot recover more than the total amount of his loss (see *North British and Mercantile Insurance Co v London, Liverpool & Globe Insurance Co* (1877) 5 Ch D 569 at p 581 and *Goldstein v Salvation Army Assurance Society* [1917] 2 KB 291).

[14] It is trite that an insurer's right of contribution is not based on contract but arises from principles of equity, namely that persons who are liable for the same loss should contribute equally towards the loss, (see Poh Chu Chai, *Principles of Insurance Laws* (6th Ed), at p1243). The right of contribution depends on equity which requires that the burden should be shared equally (see *Legal & General Assurance Society Ltd v Drake Insurance Co Ltd* [1991] 2 Lloyd's Rep 36 (Court of Appeal)).

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[15] To give rise to a right of contribution the following conditions must be fulfilled:

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(a) all policies concerned must comprise the same subject matter;

(b) all policies must be effected against the same peril;

(c) all policies must be effected by or on behalf of the same assured;

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(d) all policies must be in force at the time of loss;

(e) all policies must be legal contracts of insurance; and

(f) no policy must contain any stipulation by which it is excluded from contribution.

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[16] Most policies of non-marine insurance contain a contribution clause limiting the liability of the insurers to their rateable proportion of the loss (see *Gale v Motor Union Insurance Co Ltd* [1928] 1 KB 359 and *Commercial Union Assurance Co Ltd v Hayden* [1977] QB 804; [1977] 1 All ER 441 (CA)). In this case the assured cannot claim payment in full under any of the policies; each policy is liable for its rateable proportion only, (see *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co; Scottish Amicable Heritable Securities Association v Northern Assurance Co* (1883) 11 R 287). If there is no such rateable proportion clause in the policy, the assured is entitled to claim payment in full under any of the policies, leaving the insurer under that policy to claim contribution from their co-insurers, (see *Halsbury's Laws of England*, (4th Ed)(Reissue), Vol 25 para 520).

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[17] Where a policy contains a rateable proportion clause the insurer is not entitled to contribution from the other insurers, if it pays out more than the proportion it is liable to pay under its policy, since contribution only arises out of legal obligation to pay (see *MacGillivray on Insurance Law* (11th Ed), at p 684 and *Bovis Construction Ltd v Commercial Union Assurance Co Plc* [2001] 1 Lloyd's Rep 416).

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[18] The above proposition is also supported by the English Court of Appeal decision in *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd*. In that case, the court held that there could be no claim in contribution by the

A plaintiffs where there were effective rateable proportion clauses in the policies of each insurer. Lloyd LJ in that case ruled as follows:

B Is it possible for the plaintiffs now to recover 50% which they need not have paid? Mr Woods argued that the excess over 50% was a voluntary payment. Since the right of contribution only arises in equity where an insurer has been obliged under his policy to pay more than his rateable proportion, the plaintiffs cannot recover the excess from the defendants. The rateable proportion clause *excludes the rights of contribution*.

C [19] In the same case, Ralph Gibson LJ opined as follows:

D It follows, in my judgment, that although the plaintiffs were obliged under the Road Traffic Act to settle the full amount of the claim of the injured third party, the plaintiffs were entitled to limit their liability to Mr Arora to 50% of what they were compelled by statute to pay out ... For my part, I accept that the plaintiffs acted sensibly and generously towards Mr Arora, but I am unable to see that their conduct can increase or alter the nature of their rights against the defendants. At best, in my judgment, the plaintiffs could recover only contribution in respect of their legal liability to Mr Arora, but since the basis of contribution is payment by a claimant in excess of his rateable proportion as between co-insurers, there can be no claim in contribution by these plaintiffs or, as it seems to me, in any case where there are effective rateable proportion clauses in the policies of each co-insurer. I agree therefore, that the appeal should be allowed ... I would add however, that the fact that insurers commonly make provision with reference to the effect of existing 'other insurance' by means of rateable proportion clauses seems to me to support my view that there is no right to contribution in the circumstances of this case.

G [20] Based on the above authorities, in deciding issue of contribution as in the present case, the court must first determine whether there is in existence any rateable proportion clause in the policies in question. If there is 'Yes', then the issue must be decided based on the wordings of the clause and the insurers have no right of contribution among them.

H [21] In the present case, there is a rateable proportion clause in the respondent's fire policy which limits the respondent's liability. Condition 19 of the policy provides:

I If at any time of any loss or damage happening to any property hereby insured, there be any other subsisting Insurance or Insurances, whether effected by the Insured or by any other person or persons, covering the same property this Company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage.

[22] It is noted that the appellant's CAR policy also has the same rateable proportion clause at condition 9, which similarly limits their liability.

[23] In the present case, where there were two insurances or policies subsisting covering the same insured and the same subject matter (the respondent's fire policy and the appellant's CAR policy), the liability of each insurer should be 50:50 basis ie each insurer shall not be liable to pay more than 50% (half) of the total amount claimed by the insured, (see *Legal & General Assurance Society Ltd v Drake Insurance Co Ltd*. In that case Lloyd LJ held: 'since there was another insurance covering the same loss at the time the claim arose, the plaintiffs were not liable for more than 50% of Mr Arora's claim.'

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[24] In short, the respondent was only liable in law to pay 50% (half) of the total (100%) claim by the insured. In this case, the respondent had paid the full (100%) of the claim by the insured. It follows that the respondent was a volunteer in respect of half of the indemnity it afforded to the insured. In the circumstances the respondent could not look for contribution or otherwise to cover that part of the indemnity in respect of which it had no legal liability to pay under the rateable proportion clause.

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[25] As contribution is an equitable right, the famous maxim of equity that: 'equity will not assist a volunteer' is applicable. As can be seen above, the respondent paid the full (100%) of the insured claim when it was only legally liable to pay 50% of it. The respondent had no legal obligation to pay the extra 50% of the claim. As such the respondent had acted as a volunteer or had paid on an ex-gratia basis on the extra 50% (see *Shatomah v Kader Maydin* (1870) SLR Leic 275; and *Bovis Construction Ltd v Commercial Union Assurance Co Plc*).

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[26] Lloyd LJ in *Legal & General Assurance Society Ltd v Drake Insurance Co Ltd* had said:

It follows that, so far as the defendants were concerned, the excess over 50% was a voluntary payment I cannot see any answer to that conclusion. Nor can I see how the plaintiffs could recover from the defendants half the 50% which was their net liability to Mr Arora, whether by way of contribution or on any other basis.

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[27] The above principle was followed in *Bovis Construction Ltd v Commercial Union Assurance Co Plc* [2001] 1 Lloyd's Rep 416. Here both Eagle Star Insurance Co Ltd and the defendant have insured Bovis under different policies. The defendant had issued a CAR policy and Eagle Star a public liability policy. The defendant had repudiated the claim by Bovis on the grounds that the claim was not covered by the policy. Eagle Star Insurance Co Ltd then — proceeded to indemnify Bovis in full and then sought to recover together with Bovis against the defendant. Eagle Star's policy contained a rateable proportion clause similarly worded to our case. In dismissing Eagle Star's claim in contribution, David Steel J at p 419 stated:

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- A ... Eagle Star in fact provided a full indemnity to Bovis... it follows that Eagle Star was a volunteer in respect of half of the indemnity it afforded to Bovis ... in the circumstances, the defendant contended, Eagle Star could not look for contribution ... or otherwise to cover that part of the indemnity in respect of which it had no legal liability ... I accept that submission and conclude that the claim by Eagle Star is, in this respect, misconceived and must fail.
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- [28] Based on the above established maxim and authorities the respondent's claim for contribution in the present case must fail as they had volunteered to pay Perdana Parkcity (the insured) in full of its claim of RM1,011,838.31 eventhough there was no legal liability for them to do so under their fire policy (as for condition 19 — rateable proportion clause). On this ground alone, the present appeal can be allowed.
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- D [29] For completeness, the court will now consider another aspect of the voluntary payment (ex-gratia payment) made by the respondent to the insured eventhough there was no legal liability to do so under the fire policy.

- E [30] The respondent's claim for contribution in this case is based on their payment under an extension to the respondent's fire policy's 'Subsidence and Landslip' cover. The basis of the payment is as for the wordings '... insurance under this Policy shall extend to cover loss or damage to the property insured caused by subsidence and or heave of the side on which the buildings stand or land belonging thereto, or Landslip excluding: (c) loss or damage by happening through, or in consequence of — *defective design or inadequate construction of foundation*.'
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- G [31] The appellant contended that the respondent's fire policy in fact does not respond to the insured's claim and as such the peril claimed against is not covered under the policy because there was no subsidence to trigger off the 'Subsidence and Landslip' extension and the loss was caused by defective design which is an excluded peril.

- H [32] For the 'Subsidence and Landslip' extension to respond, there has to be 'subsidence'. However, in the present case PW3, who is a geo-technical engineering expert (the respondent's own witness), has admitted that one of the causes of the failure was 'settlement'. In fact, in his conclusion, PW3 states:

- I 8.1 In view of the above, JPK are therefore of the opinion that the reported cracking to the housing unit was due to continuing time dependent differential settlement of footings consequent of continuing consolidation of the pre-existing variable dumped fill that was placed at various times during past quarrying operation with little or no compaction initially over virgin/undisturbed residual granitic soils. This continuing and differential

consolidation had come about following placing of the compacted fill of highly non-uniform thickness (surcharging) over the pre-existing variable dumped fill also of varying thickness.

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8.2 JPK are also of the opinion that a substantial portion of the settlement was probably also triggered and accelerated by internal soil erosion and/or collapse settlement in the loose pre-existing soils.

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8.3 The DC treatment adopted was inappropriate to treat the thick poor pre-existing ground; more so with DC through substantial compacted upper layer. As a consequence, the poor pre-existing ground below the foundations remained unimproved and prone to internal erosion and collapse settlement.

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8.4 These shortcomings are obviously *design related* issues. Both PCG and TYL had erred in the process as elaborated earlier.

[33] 'Subsidence' is different from 'settlement'. According to Dr GH Edwards in his book 'Subsidence, Landslip and Ground Heave, with special reference to Insurance (2nd Ed), at p 16, 'subsidence' is 'the downward movement of a site on which buildings stand, from causes unconnected with loading from a building. Examples are underground mining, clay shrinkage (especially due to the action of tree roots) and erosion due to water passing through the sub-soil, but excluding the compaction made-up ground or infill'.

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On the otherhand 'settlement' is 'the downward movement of the site due to the application of superimposed loading from a building, it is the wholly natural effect of superimposing a load on a site and is predictable'.

[34] At para 2, at p 23 of Dr GH Edwards' book, he states:

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Damage arising from subsidence of the site is frequently not distinguished from damage caused by settlement. In providing insurance cover, insurers are seeking to cover damage caused by fortuities which may arise during the period covered by the policy. Subsidence of the site is a fortuity, whereas settlement is not and is predictable. Simple engineering tests will establish whether the load-bearing capacity of the sub-soil beneath foundations is capable of supporting the imposed load and if not, then settlement is inevitable and is not a fortuity.

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[35] 'Subsidence' should be distinguished from 'settlement'; subsidence is associated with an abrupt change in the load — supporting characteristics of the soil, (para 3, at p 331 of Dr GH Edwards' book).

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[36] At p 338, para 1 of the book, Dr GH Edwards concludes:

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damage caused by subsidence of the site is insured and should be paid by insurers, whereas damage from settlement should not be paid by buildings' insurers.

[37] In the present case, PW3 prepared the Jurutera Perunding Kemajuan

- A (JPK) report does not mention ‘subsidence’ as a cause of failure. Therefore, based on the above authorities, the claim is not payable by the respondent.
- B [38] The adjusters have erroneously used the words ‘subsidence’ and ‘settlement’ interchangeably in their reports. They have failed to distinguish the two in their reports. It is a clear and fundamental error on the part of the adjusters.
- C [39] The damage in the present case, to the property are the cracks that appeared on the walls of several units of Nadia Parkhomes which was discovered on 11 January 2006. The payment of the claim made by the Insured for this loss was primarily based on the final report of the loss adjusters which concludes that ‘the short comings are obviously design related issue’.
- D [40] To the learned trial judge, he agreed with the learned counsel for the respondent that ‘settlement’ may be a part of ‘subsidence’. At p 15 of his grounds of judgment he says:
- E In other words, I do not for one moment dispute that there is a difference between ‘subsidence’ and ‘settlement’ but in my judgment, both ‘subsidence’ and ‘settlement’ may be covered under the plaintiffs policy depending the causes of the cracks on the property.
- F [41] The undisputed facts presented by the respondent’s own witnesses (PW3 and PW4), is that the loss was caused by a pre-existing condition in the soil thus making the whole thing predictable. It was not caused by an ‘abrupt change’ in the load-supporting characteristics of the soil. Thus, it was not ‘unforeseen or not capable of reasonable prediction’. The loss is therefore not fortuitous and therefore not payable under the respondent’s fire policy.
- G [42] The land in question was an ex-quarry site and the earth was then dumped and compacted by way of dynamic compaction. This was instrumental in causing the settlement as per JPK’s conclusions in its report. The loss adjuster (PW4) agreed that based on the fact that the land was an ex-quarry site, PCG and/or TYL (the consultants) should have come up with a different design method in respect of the appropriate compaction required for such a situation. This was something predictable and foreseeable. Any failure due to something foreseeable is not payable under the fire policy.
- H
- I [43] Under the fire policy, loss or damage by happening through, or in consequence of *defective design or inadequate construction of foundation* is excluded from coverage and thus not payable. PW4 agreed that a ‘design’ is a working plan to be used in the accomplishment of something projected. So, for an engineer, how the work is to be carried out for a particular project would be

the 'design'. The word 'design' is wide enough to cover the method employed by the engineer in order to carry out the earthworks in question. A

[44] *Hudson's on Building & Engineering Contracts* (11th Ed), at p 293 defines 'design' to 'include specifications, whether or not incorporated in bills of quantities, as well as plans and drawings, and indeed any element of choice on the part of the designer, such as requirements of materials and working methods'. B

[45] The various definitions of 'design' were considered in the case of *Pentagon Construction [1969] Co Ltd v United States Fidelity & Guarantee Co* [1978] 1 Lloyd's Rep 93. Bull J at p 95 said: C

... Hudsons Building and Engineering Contracts ... has great relevance. The 'design' is referred to as being a wide terms which includes not only structural calculations, shape and location of materials, but their choice, as well as the choice of particular work processes and concludes with the following words: In other words, in sophisticated contracts the design includes the specifications as well as the drawings, in my opinion, the construction contract here qualifies as such a 'sophisticated contract' and with respect to it 'design' would include the drawings and specifications for the project or 'works' thereunder. D E

[46] PW4 (the loss adjuster) had highlighted the shortcomings of the design by PCG and TYL under the third party aspects of his report and based on these shortcomings in the design, he was of the view that there was a prospect of recovery or subrogation against the consultants PCG and TYL. Here, the loss adjusters were convinced that the design was defective. The loss adjusters also quoted in their own report, the final finding of its expert (JPK) that the cause of the loss is 'design related'. F

[47] The learned trial judge in his grounds of judgment (at p 19) accepted the fact that 'the expert is clearly of the opinion that the dynamic compaction method adopted was inappropriate'. G

[48] This court is of the view that since the cause of the loss is design related, then exclusion (c) of the 'Subsidence and Landslip' extension would apply to exclude the insured's claim under the fire policy. Therefore the payment made by the respondent to the insured was clearly made voluntarily and on an ex-gratia basis ie when the respondent was not legally liable under the fire policy to make such payment. Such voluntary payment will not trigger the application of contribution as stated earlier. Equity will not assist a volunteer. H I

[49] In *Queensland Government Railways & Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd* [1969] 1 Lloyd's Rep 214, it was

A held that any loss due to the excluded element are clearly excluded and not payable under the policy regardless of whether there was negligence on part of the insured. Therefore the issue of a right of contribution does not arise as the payout was made voluntarily, in the absence of any liability due to faulty design which has been excluded from the policy.

B

[50] The learned trial judge in his grounds of judgment (at p 10) found that the policies contain no stipulation by which contribution is excluded. He said:

C My examination of the two policies did not reveal any provision in either the plaintiffs fire policy or the defendant's CAR policy excluding the right to contribution.

D [51] This court agrees that there is no express provision to exclude the right to contribution in both the policies. However the learned trial judge failed to appreciate that both policies contain rateable proportion clause which in effect exclude the right to contribution, as discussed earlier, (see condition 19 of the respondent's fire policy and condition 9 of the appellant's CAR policy).

E [52] There is a serious misdirection by the learned trial judge in failing to consider the rateable proportion clause despite the submissions from the appellant's counsel highlighting the existence of the same in the respondent's fire policy. There was also insufficient judicial appreciation by the learned trial judge of the evidence of circumstances placed before him and the principles that should govern such a case.

F

CONCLUSION

G [53] In the present case there is a rateable proportion clause both in the respondent's fire policy (condition 19) as well as in the appellant's CAR policy (condition 9), which limits their respective liability. The liability of each insurer is based on 50:50 proportion. The respondent was only liable in law to pay 50% of the total (100%) loss claimed by the insured. There are ample authorities to support the proposition that where a policy contains a rateable proportion clause the insurer is not entitled to contribution from the other insurers, if it pays out more than the proportion it is liable to pay under its policy, since contribution only arises out of legal obligation to pay. On this ground alone, the appeal must be allowed with costs.

H

I [54] Alternatively, the maxim: 'equity will not assist a volunteer' is applicable in the present case. In this case, the cause of the loss is 'design related'; therefore exclusion (c) of the 'Subsidence and Landslip' extension would apply to exclude the loss claim under the respondent's fire policy. The whole payment (100%) made by the respondent to the insured was clearly made voluntarily

and on ex-gratia basis ie when the respondent was not legally liable under the fire policy to make such payment. As stated earlier, such voluntary payment does not trigger the application of contribution from the appellant. This is another ground for the appeal to be allowed with costs.

[55] Based on the above considerations this court finds that the appellant is clearly not liable to the respondent for contribution and had rightly and lawfully denied the respondent's claim. The learned trial judge has therefore erred in allowing the respondent's claim with costs.

[56] This court therefore unanimously allows the appellant's appeal with costs of RM20,000 to the appellant. Deposit to be refunded.

Appeal allowed with costs.

Reported by Kohila Nesan

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